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No. 81-138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHANDLER UNIFIED SCHOOL DISTRICT; ANNA MARIE JACOBSON, BEN RUOTI, LYNN JONES, EDWARD BASHA AND BETTY BOGLE, IN THEIR CAPACITY AS MEMBERS OF THE BOARD OF EDUCATION OF THE CHANDLER UNIFIED SCHOOL DISTRICT; JAMES T. PERRY, IN HIS CAPACITY AS SUPERINTENDENT OF THE CHANDLER UNIFIED SCHOOL DISTRICT; AND HOWARD T. CONLEY, IN HIS CAPACITY AS PRINCIPAL OF CHANDLER HIGH SCHOOL,

Petitioners,

vs.

THERESA M. COLLINS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether officially sanctioned group prayer sessions in public primary and secondary schools during regular school hours violate the Establishment Clause as this Court held in *Engel v. Vitale*, 370 U.S. 421 (1962), and *School District v. Schempp*, 374 U.S. 203 (1963).

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CHANDLER UNIFIED SCHOOL DISTRICT; ANNA MARIE JACOBSON, BEN RUOTI, LYNN JONES, EDWARD BASHA AND BETTY BOGLE, IN THEIR CAPACITY AS MEMBERS OF THE BOARD OF EDUCATION OF THE CHANDLER UNIFIED SCHOOL DISTRICT; JAMES T. PERRY, IN HIS CAPACITY AS SUPERINTENDENT OF THE CHANDLER UNIFIED SCHOOL DISTRICT; AND HOWARD T. CONLEY, IN HIS CAPACITY AS PRINCIPAL OF CHANDLER HIGH SCHOOL,

Petitioners,

vs.

THERESA M. COLLINS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Theresa M. Collins respectfully prays that this Court refuse to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, entered on May 4, 1981.

RESTATEMENT OF THE CASE

A. *The Parties*

Respondent Theresa M. Collins, a parent of a student attending a public high school, brought this suit to enjoin group prayers conducted on school premises during school hours with the admitted knowledge, approval and permission of petitioner school authorities.*

B. *The Challenged Activities***

As part of its regular educational program, Chandler High School periodically conducted student assemblies on the premises of the high school during regular school hours. During the two school years prior to the filing of this lawsuit in 1978, and continuing until entry

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*The petitioners are Chandler Unified School District (the "District") and those persons charged with responsibility for prescribing and enforcing rules for governing the high school: the President of the Board of Education of the District (the "Board"), all members of the Board, the Superintendent of the District and the principal of Chandler High School.

**Petitioners' Statement of the Case contains numerous factual assertions contested before the district court and never established. In particular, the record does not establish petitioners' assertions regarding the supposedly "voluntary" [Pet. at 6], "optional" [*id.*] and non-"mandatory" [*id.* at 9] nature of the prayer sessions. Likewise, petitioners' allegations regarding the availability of a "supervised study hall" [*id.* at 2] as an alternative to attending a given assembly also is not established.

By contrast, each petitioner stipulated to every fact set forth herein.

More importantly, even under petitioners' version of the facts (*i.e.*, even if attendance at the prayer sessions had been "voluntary"), the challenged activity, under the decided cases, remains unconstitutional.

of the injunction, petitioners permitted group prayers to take place at the outset of many such assemblies. The high school principal, with the knowledge and concurrence of the Superintendent of the District and the Board, gave some students approval and permission to open the assemblies with such prayers.

C. *The Petitioners' Statutory Responsibilities*

Chandler is a unified school district established pursuant to Ariz. Rev. Stat. Ann. § 15-491 (1974) and a political subdivision of the State of Arizona. That statutory scheme requires petitioner school board members to prescribe and enforce rules for governing the schools in the district which the principal must carry out insofar as they pertain to the high school. *Collins v. Chandler Unified School District,* 470 F. Supp. 959, 961 (D. Ariz. 1979), *aff'd,* 644 F.2d 759 (9th Cir. 1981). Further, Ariz. Rev. Stat. Ann. § 15-442 (West Supp. 1980) provides that the Board shall "[m]aintain the schools established by them"; "[e]nforce the courses of study"; "[m]anage and control the school property within its district"; and "[p]rovide for supervision over pupils in instructional activities . . . and in noninstructional activities."

D. *The Decisions Below*

In granting respondent's motion for summary judgment on the merits and declaring the group prayers unconstitutional as a matter of law, the district court expressly relied upon this Court's decision in *Engel v. Vitale,* 370 U.S. 421 (1962), holding voluntary prayers in the public schools "to be wholly inconsistent with the Establishment Clause." 470 F. Supp. at 961. The court distinguished *Zorach v. Clauson,* 343 U.S. 306 (1952), as "involv[ing] religious activity not conducted by the school but away from the school under a released time program."

470 F. Supp. at 963. In the case at hand, as the court pointed out, "prayers are taking place during school assemblies on public school property." *Id.*

The court of appeals affirmed the district court's decision on the merits under the controlling authority of *Engel* and *School District v. Schempp*, 374 U.S. 203 (1963). The court rejected the "voluntary" prayer defense raised by petitioners and additionally noted that the applicable cases "support no meaningful distinction between school authorities actually organizing the religious activity and officials merely 'permitting' students to direct the [prayer] exercises." 644 F.2d at 761.

The Ninth Circuit expressly followed the reasoning of the Second Circuit in *Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980) (holding unconstitutional "voluntary" communal prayer meetings in the classroom prior to commencement of school), and applied the three-part test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Guided by *Lemon*, the court of appeals, concerned particularly with the "institutionally coercive setting of primary and secondary schools," determined that: (i) there was "no apparent secular purpose" to the assembly prayer sessions; (ii) "the primary effect of such prayer appears to advance religion"; and (iii) since the school officials had a duty to supervise "the obviously large gathering of students" at the school assemblies, the prayer sessions necessarily involved excessive entanglement of the state with religious activities. 644 F.2d at 762.

SUMMARY OF ARGUMENT

This Court should refuse petitioners' invitation to review this school prayer case for several principal reasons:

First, this Court has unequivocally declared that prayers in public schools, whether or not "voluntary," violate the Establishment Clause. There is no meaningful distinction between this case and those prior rulings.

Second, the state activity in this case runs afoul of the Establishment Clause under *Lemon v. Kurtzman* because: (i) there is no secular purpose to public school prayer sessions; (ii) the challenged conduct impermissibly advances the cause of religion; and (iii) endorsement of the petitioners' activities serves to foster excessive entanglement of the state in the supervision of religious activities.

Third, contrary to petitioners' unsupported assertion, there is absolutely no conflict between the opinion of the court of appeals and the long line of school prayer cases beginning with *Engel v. Vitale*, 370 U.S. 421 (1962).

REASONS FOR DENYING THE WRIT

I.

THE CHALLENGED ACTIVITIES ARE UNCONSTITUTIONAL UNDER THE DISPOSITIVE DECISIONS OF *ENGEL v. VITALE* AND *SCHOOL DISTRICT v. SCHEMPP*.

A. *Group Prayers in Public Schools, Whether or Not "Voluntary," Are Unconstitutional.*

Petitioners have offered no reason to retreat from the Court's prior decisions holding unconstitutional the same challenged conduct at issue here. *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidating the practice of prayers in public schools as an unconstitutional violation of the Establishment Clause); *School District v. Schempp*, 374 U.S. 203 (1963) (classroom Bible readings offend the Establishment Clause).

Petitioners make much of the supposedly "voluntary," "optional" and non-"mandatory" nature of the prayer sessions at issue. [Pet., *passim*] In fact, petitioners concede that the "heart" of their claim is "the significance of the voluntary nature of the assembly program." [*Id.* at 11]

But petitioners ignore that this Court has unequivocally rejected that "voluntariness" argument. Thus, *Engel* held group prayers in public schools unconstitutional even though "[n]o student [was] compelled to take part" and "[p]rovision [was] also made for excusing children . . . from the saying of the prayer or from the room in which the prayer [was] said." 370 U.S. at 438. As the Court explained, "the fact that its observance on the part of the students is voluntary can[not] serve to free it from the limitations of the Establishment Clause" because it "ignores the essential nature of the program's constitutional defects." *Id.* at 430. Likewise, *Schempp* held Bible reading in schools unconstitutional notwithstanding "that individual students may absent themselves upon parental request." 374 U.S. at 224-25.*

Petitioners also ignore that the lower courts have consistently heeded these holdings regarding the immateriality of the "voluntariness" of the religious activities. *E.g., Karen B. v. Treen,* No. 80-4003, slip op. at 7 (5th Cir. Aug. 5, 1981) ("wholly voluntary" nature of school prayer program held "not relevant to the Establishment Clause inquiry"); *Brandon,* 635 F.2d at 978

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*Similarly, in Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 206 (1948), the only pupils participating in the condemned religious activity involved were those "whose parents consented" to their voluntary absence from their regular secular classes. No child was forced to receive religious instruction and, thus, the entire program was just as "voluntary" as that involved here.

("student-initiated voluntary prayer" violates the Establishment Clause).*

In short, petitioners' position, that any purported "voluntariness" somehow "distinguishes" this case, is seriously misleading and must be rejected on its face.

B. *That a Group of Students, Rather Than School Administrators, Composed the Prayers Is Immaterial Given the Admitted Approval and Supervision of the Prayer Sessions by School Officials.*

Petitioners seek to distinguish *Engel* and *Schempp* on the additional ground that the "prayer plan" [Pet. at 17] adopted in this case was supposedly "student-initiated" [*id.* at 6] as opposed to being a product of petitioners. That distinction has no basis in law.

First, school prayer cases have repeatedly rejected any purported "hands-off" attitude as a defense. *Brandon*, 635 F.2d at 978 (school facilities could not be used by student group called "Students for Voluntary Prayer" because even "an authorization of student-initiated voluntary prayer would have violated the Establishment Clause"); *Stein v. Oshinsky*, 348 F.2d 999, 1002 (2d. Cir.), *cert. denied*, 382 U.S. 957 (1965) (it is unconstitutional to "permit" "student-initiated" prayers); *Goodwin v. Cross County School District No. 7*, 394 F. Supp. 417, 423

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*Petitioners' reliance on Wood v. Mt. Lebanon Township School Dist., 342 F. Supp. 1293 (W.D. Pa. 1972), is misplaced. The *Wood* court expressly distinguished *Engel* by noting that the "graduation ceremonies" at issue were "ceremonial and [were] in fact not a part of the formal, day-to-day routine of the school curriculum to which is attached compulsory attendance." *Id.* at 1294. Moreover, unlike the situation present here and in *Engel*, there was "no governmental stamp of approval placed on the invocation and benediction to be said at the graduation ceremony." *Id.*

(E.D. Ark. 1973) (holding it unconstitutional for school principal to "grant[ ] permission" for challenged religious activities even though "the practices permitted . . . were performed through the auspices of the Student Council").

Second, petitioners here did more than passively survey the scene supposedly created by the student council alone. Indeed, in addition to scheduling and supervising the assemblies, they concededly approved and gave permission for the "prayer plan." [Pet. at 9; 644 F.2d at 762]

Third, petitioners' argument ignores that they have a statutory duty to "[m]anage and control the school property" and "[p]rovide for supervision over pupils in instructional activities . . . and in noninstructional activities" [Ariz. Rev. Stat. Ann. § 15-442 (West Supp. 1980)]. As a result of this statutory scheme, school authorities cannot hide behind the student council and evade the responsibilities it has to all the students. See *Brandon*, 635 F.2d at 979.

It surely makes no constitutional difference to the individual student that a student group rather than school authorities supposedly wrote or conducted the prayers. As the *Goodwin* court recognized, "[t]he fact that the practices permitted . . . were performed through the auspices of the Student Council, is begging the issue." 394 F. Supp. at 423.

C. *The "Religious Speech" and "Free Exercise" Rights of the Students Are Not Being Abridged by the Injunction Forbidding the Use of the High School as a Facility for Prayer Sessions.*

Petitioners urge that their activities amounted to a mere "[b]enign accommodation" [Pet. at 9] of "the students' right of free exercise" [*id.* at 8]. Similarly, peti-

tioners argue that the injunction prohibiting the implementation of the "prayer plan" in the high school abridges some students' rights to engage in "religious speech" [*id.* at 18].*

The courts have repeatedly denounced the activities involved here as unconstitutional notwithstanding any asserted "free exercise" rights of the students. *Schempp*, 374 U.S. at 225-26 (rejecting the contention that elimination of prayers in public schools was an interference with children's religious liberty under the Free Exercise Clause); *Stein v. Oshinsky*, 348 F.2d at 1001 ("[n]either [the Free Speech Clause nor the Free Exercise Clause] provision requires a state to permit persons to engage in public prayer in state-owned facilities"); *Hunt v. Board of Education*, 321 F. Supp 1263, 1266 (S.D. W. Va. 1971) (prohibiting prayers from being conducted on school property prior to opening of school did "not deny" "constitutional rights of freedom of speech, freedom of assembly or the free exercise of . . . religious beliefs").** Likewise, the "protections of political and religious speech" "are inapposite" when "the explicit Establishment Clause proscription against prayer in the public

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*None of petitioners' cited cases support that proposition. They either did not involve religious activities [Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (arm bands worn in war protest); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (disclosure of membership lists)] or did not address the issue of prayer in schools [Murdock v. Pennsylvania, 319 U.S. 105 (1943) (door-to-door distribution of religious tracts); Fowler v. Rhode Island, 345 U.S. 67 (1953) (sermons delivered in public park)].

**Zorach v. Clauson, 343 U.S. 306 (1952) (students permitted to leave school for religious activities conducted off school premises), cited by petitioners, is inapposite. As recognized by both courts below, *Zorach* involved no use of public school property and no religious activities took place at the school. 470 F. Supp. at 963; 644 F.2d at 761.

schools is considered." *Brandon*, 635 F.2d at 980. See also, *Stein v. Oshinsky*, 348 F.2d at 1001; *State Board of Education v. Board of Education*, 108 N.J. Super. 564, 262 A.2d 21, 32 (1970).

In sum, petitioners' argument ignores the teaching of these cases that a classroom is not a "public forum" where the performance of religious rituals may be permissible. *Brandon*, 635 F.2d at 980.

II.

THE CHALLENGED ACTIVITIES FAIL EACH OF THE THREE TESTS UNDER *LEMON v. KURTZMAN* FOR DETERMINING THE CONSTITUTIONALITY OF STATE ACTION.

As explained in *Stone v. Graham*, 101 S. Ct. 192, 193 (1980) (posting of Ten Commandments in schools held unconstitutional), an activity which fails to satisfy *any one* of the elements of the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), violates the Establishment Clause. The three *Lemon* requirements that petitioners must meet are as follows:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive entanglement with religion.' "

403 U.S. at 612-13.

Here the group prayer sessions fail to meet *all three* requirements.

A. *There Is No Colorable Secular Purpose for Holding Prayer Sessions in Public Schools During Regular School Hours.*

The first element in the *Lemon* test requires petitioners to show that the activity involved has a secular purpose. 403 U.S. at 612. Petitioners cite dicta from *Brandon* (holding that a school board properly refused to permit communal prayer meetings on school premises) to suggest that prayer sessions are permissible to encourage "extracurricular activities." [Pet. at 13]

But there is nothing "extracurricular" about group prayers at official school assemblies, on school premises, conducted during hours—especially when state law requires all students to be in school and supervised by school officials. In fact, there is no conceivable secular educational purpose that can be furthered by praying during school assemblies:

> "Prayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people. Indeed, since prayer is a primary religious activity in itself, its observance in public school classrooms has, if anything, a more obvious religious purpose than merely displaying a copy of a religious text in the classroom [a practice held unconstitutional in *Stone v. Graham*]."

Karen B. v. Treen, No. 80-4003, slip op. at 5 (5th Cir. Aug. 5, 1981).

B. *Recitation of Prayers During Official School Assemblies Impermissibly Advances Religion.*

Petitioners also fail to meet the second element of the *Lemon v. Kurtzman* test, that the activity involved does not have the effect of advancing religion.

The recitation of "an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object," promotes religion "by encouraging observance of a religious ritual in the classroom." *Karen B. v. Treen*, No. 80-4003, slip op. at 6 (5th Cir. Aug. 5, 1981). Moreover, since school officials must, by statute, supervise these assemblies, the appearance of official support has the effect of advancing religion. *Brandon*, 635 F.2d at 979.

Petitioners' reliance on *Wood v. Mt. Lebanon Township School District*, 342 F. Supp. 1293 (W.D. Pa. 1972), is misplaced. In *Wood*, the district court held that a mere invocation by a clergyman at a high school graduation did not violate the Establishment Clause. 342 F. Supp. at 1294. High school graduation ceremonies, held outside normal school hours, attended by members of the general public and which occur only once a year, are manifestly different from scheduled school assemblies occurring on school property, during school hours on regularly scheduled school days. Accordingly, *Wood* does not alter the conclusion that conducting prayers at school assemblies has the necessary effect of advancing religion.*

C. *Petitioners Were Excessively Entangled in the Religious Activity.*

The third element of the *Lemon* test, that the activity not foster an excessive entanglement with religion,

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*Petitioners also cite Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965). While clearly distinguishable because the religious activity occurred during nonschool hours and did not precede activities attended by the entire student body, the *Reed* decision has been criticized for its questionable legal analysis. Brandon, 635 F.2d at 979 n.9 ("[w]hile the outcome of the [*Reed*] case was questionable even in 1965, the Supreme Court's adoption of the entanglement test in 1969 . . . seriously undercuts the holding").

serves to avoid government involvement in religious activity. In the context of school activities, unconstitutional entanglement occurs when school officials are obligated by statute to monitor the prayer sessions. *Brandon*, 635 F.2d at 979.

The teachers and officials here responsible for governing the high school were entangled in the religious activities. Ariz. Rev. Stat. Ann. § 15-442.A.20 (West Supp. 1980) requires the Board to "[p]rovide for supervision over pupils in instructional activities . . . and in noninstructional activities . . . ."* Accordingly, the Board had a statutory duty to provide for supervision of the prayers by teachers or other school officials during the assemblies. Moreover, any purported system for excluding students from the assemblies [Pet. at 2] had to be implemented by school officials.

In sum, the prayer sessions fail to meet *every* test under *Lemon;* and failure to meet any one requires denial of the petition.

III.

THE NINTH CIRCUIT'S DECISION DOES NOT "CONFLICT" WITH THAT OF ANY OTHER COURT.

Petitioners allude to alleged "conflicts" [Pet. at 6] and "discrepancies" [*id.* at 18] between the Ninth Circuit's decision and those of other courts. In fact, however, since the landmark decisions of *Engel* and *Schempp*, every court facing the issue has declared prayer sessions in public primary or secondary schools during school

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*The Board must also "[e]nforce the courses of study" [Ariz. Rev. Stat. Ann. § 15-442.A.2 (West Supp. 1980)] and "[m]anage and control the school property within its district" [Ariz. Rev. Stat. Ann. § 15-442.A.8 (West Supp. 1980)]

hours and on school grounds unconstitutional. *Karen B. v. Treen*, No. 80-4003 (5th Cir. Aug. 5, 1981); *Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980); *DeSpain v. DeKalb County Community School District*, 384 F.2d 836 (7th Cir. 1967), *cert. denied*, 390 U.S. 960 (1968); *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965); *Goodwin v. Cross County School District No. 7*, 394 F. Supp. 417 (E.D. Ark. 1973); *Hunt v. Board of Education*, 321 F. Supp. 1263 (S.D. W. Va. 1971); *State Board of Education v. Board of Education*, 108 N.J. Super. 564, 262 A.2d 21 (1970).*

The cited cases uniformly condemn prayers in public schools as violative of the Establishment Clause. Thus, the opinions below are totally consistent with the decisional law.

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*Petitioners' reliance on Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980), *cert. granted sub nom.* Widmar v. Vincent, 101 S. Ct. 1345 (1981) (allowing certain religious activity on university campus), is misplaced. Even if decided correctly, *Chess* involved a university, not a public high school, where adult students who "rely on their college campus as their total community" would be forced to go off-campus for any religious observances. 635 F.2d at 1320. In fact, this is precisely the distinction relied upon by the Eighth Circuit in *Chess*, *id.* at 1319-20, and recognized by the Second Circuit in *Brandon*, 635 F.2d at 977 ("[a]uthorization for prayer at public universities . . . has been required because students both study and reside there. Frequently they are unable to hold prayer meetings off campus").

CONCLUSION

There is no occasion for this Court to belabor the obvious and restate the readily apparent law of the last twenty years. Accordingly, the Court should decline to review this case by writ of certiorari.

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Respectfully submitted,

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